SUPREME COURT, U. S.
125 2
APR 10 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO
Plaintiff-Appellee,
vs.
CARL FAGER,
Defendant-Appellant

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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and
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INDEX.

Appeal 1

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 3

Statement of Facts 3

Argument 4

Conclusion 6

In the Supreme Court of the United States

APRIL TERM 1967

CARL FAGER
Appellant

vs.

THE STATE OF OHIO
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on January 11, 1967, dismissing an appeal as of right and overruling a motion for leave to appeal from the Court of Appeals. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The only opinion written below, that of the Court of Appeals for the Seventh Ohio Appellate District, is unreported.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review this decision on appeal is conferred by Title 28, United States Code, Section 1257 (2).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) In order to sustain a conviction under O.R.C. 2907.10 must the existence of the night season at the time of the offense be proven by positive, clear and affirmative evidence beyond a reasonable doubt and is not defendant deprived of the due process of law guaranteed him by the 14th Amendment of the Constitution of the United States by failure of prosecution to prove same?

(2) Whether the petitioner was deprived of the due process of law guaranteed him by the 14th Amendment of the Constitution of the United States where night season, one of the essential elements of a crime as in a charge of R.C. 2907.10, a jury was permitted to speculate as to the fact of the night season?

(3) Is the petitioner denied due process of law as guaranteed him by the 14th Amendment of the Constitution of the United States where a question of fact, such as the presence or absence of darkness, is submitted to the jury where there is no evidence to guide the jury or where all of the evidence points to only one condition existing?

STATUTE INVOLVED

Ohio Revised Code 2907.10:

"Burglary in an uninhabited dwelling or other building. No person shall in the night season maliciously and forcibly break and enter, or attempt to break and enter an uninhabited dwelling house, or a kitchen, smokehouse, shop, office, storehouse, warehouse, malthouse, stillhouse, mill, pottery, factory, watercraft, schoolhouse, church, meeting house, barn, stable, railway car, car factory, station house, hall, or other building, or attempt to break and enter an inhabited dwelling house with intent to steal property of any value, or with intent to commit a felony. Whoever violates this section shall be imprisoned not less than one nor more than fifteen years."

STATEMENT OF FACTS

Petitioner was indicted by the September 1965 Term Grand Jury for violation of Ohio Revised Code Section 2907.10 (Burglary, night season), convicted as charged, and after a motion for a new trail was overruled, sentenced. The Seventh District Court of Appeals affirmed the conviction. The Supreme Court of Ohio on January 11, 1967 overruled Petitioner's Motion for leave to appeal from the Court of Appeals.

The evidence adduced in the lower court indicates that one, Bert Klingemier, owner of a grocery store located adjacent to his home was awakened by the sound of a burglar alarm at about 5:00 A.M. on May 28, 1965. He arose, took a shotgun and stationed himself some 200 feet from the store building. His father, Clyde Klingemier, although unarmed, watched the activity from behind a car located near the front of the store.

Two or three men attempted to leave by the front door but were dissuaded by the shouting of Bert Klingemier. They then proceeded to leave by the rear. Petitioner, who happened to be in the neighborhood, came down the road and after being told to stop, was wounded by shots from Klingemier's shotgun. Petitioner was later arrested in a nearby woods.

The evidence at the trial indicated that sunrise on May 28, 1965 was at 4:45 A.M. based on records of Curtis Barton, meterologist for U. S. Weather Bureau at the Youngstown, Ohio Municipal Airport (R. 160).

Further evidence from three witnesses, to wit; John Campany (R-177), Daniel Rowan (R-172) and Joseph Downing (R-185) indicated that it was light at the time the incident occurred.

ARGUMENT

The denial of due process in the instant case occured at the moment the jury was permitted to speculate or infer the burglary occured in the night season when in fact, no evidence was submitted to them upon which such a conclusion could be reached.

It is axiomatic in criminal law that the defendant must be proved guilty beyond a reasonable doubt in accordance with the provisions of the statute under which he is charged. All crimes in Ohio are based on statute or on a duly enacted municipal ordinance and no behavior, however, atrocious, may be punished criminally except in accordance with the provisions of a valid statute or ordinance, 15 Ohio Jurisprudence 2(d) 244, 245, Section 7.

In the instant case, it is obvious that the defendant was overcharged, to wit; charged with an offense greater than the State of Ohio could prove. The prosecution proved, if anything, that the petitioner was involved in a burglary during the daylight hours.

Conviction for a violation of Ohio Revised Code Section 2907.10, burglary in the night season, carries a penalty of from one to fifteen years, whereas conviction for a violation of Ohio Revised Code Section 2907.10, burglary in the day season carried a penalty of from one to three years. The two offenses are separate and distinct.

In Bromley v. People, 150 Ill. 297, 37 N.E. 209, the court held that, under a section of the Illinois Criminal Code which imposed different penalties for a day burglary and a night burglary, proof of a burglary in the daytime would not sustain a conviction where the indictment charged burglary at night.

> "He (an accused) is entitled to know the nature and cause of the accusation . . . so that he may be enabled to prepare and make his defense, if any, he has. The statement of the time as to the crime of burglary is an averment of a material element thereof and must be specifically proved as laid."

In re McVey, 50 Neb. 481.

The prosecution in the instant case charged the defendant with burglary in the night season. All evidence submitted indicated, at best, the act occured in the day season. The duty incumbent upon the prosecution was to prove the act occured during the night season. The petitioner, presently sentenced to one to fifteen years in the penitentiary was the victim of an inference drawn by the jury; a twelve year inference. There should be no room for the jury to speculate.

Petitioner respectfully submits that for the foregoing reasons peititioner's right of due process was denied upon the trial courts denying his motion for a directed verdict of acquittal under Ohio Revised Code 2907.10.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that rights under the Constitution of the United States be preserved and that to such an end a Writ of Certiorari should be granted and this court should review the judgment of the Supreme Court of Ohio and finally reverse it.

Respectfully submitted,

Robert W. Jones

ROBERT W. JONES

W. LEO KEATING,

Attorneys for Petitioner

PROOF OF SERVICE

I, DAVID F. McLAIN, prosecuting attorney of Trumbull County, Ohio do hereby acknowledge receipt of a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio this ..... day of April, 1967.

DAVID F. McLAIN